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FILED
JUL 27 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 216

TERRY & WRIGHT, INC. and
FEDERAL INSURANCE COMPANY, Petitioners,

versus

HUGH D. BLANCHARD and CULLEN JENKINS, d/b/a Blanchard & Jenkins Construction Company, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Review by this Court should be denied. The decision of the Court of Appeals for the Sixth Circuit affirming the Order of the District Court is not in conflict with decisions of other United States Circuit Courts of Appeal or of this Court and is not a departure from the accepted and usual course of judicial proceedings.

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No. _____

TERRY & WRIGHT, INC. and
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v.

HUGH D. BLANCHARD and CULLEN JENKINS,
d/b/a Blanchard & Jenkins Construction
Company, - - - - - - *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENTS IN OPPOSITION.

I.

OPINIONS OF COURTS BELOW.

The Memorandum and Order of the District Court is unreported and is printed in the Appendix hereto, pages 17-22, and contained in the Certified Record, pages 38a-43a. The Opinion of the Circuit Court of Appeals is printed in the Appendix, pages 23-27, and is unreported at this time. The Opinion of the Circuit Court of Appeals may also be found at the conclusion of the Certified Record.

II.

JURISDICTION.

The jurisdiction of the United States Supreme Court to review by writ of certiorari the decision of the United States Court of Appeals is set forth in 28 U.S.C. 1254.

III.

STATUTES INVOLVED.

The statutory provisions involved in this proceeding are 28 U.S.C. 1653 and 40 U.S.C. 270, all of which are set out in the Appendix at pages 29-31.

IV.

QUESTION PRESENTED.

The "Questions Presented For Review" as set out by Petitioners on page 3 of their Petition for Writ of Certiorari are the same questions which they presented to the United States Court of Appeals for the Sixth Circuit. These questions address themselves to the merits of the case and not to whether certiorari should be granted. Inasmuch as the merits of the Petitioners' appeal are not now before this Court, the Petitioners' "Questions Presented" are premature and will not be dealt with unless and until certiorari is granted by this Court.

V.

THE REASONS RELIED UPON FOR DENIAL OF WRIT.

The Respondents contend that Petitioners' writ of certiorari should be denied for the following reasons:

(1) The decision by the Court of Appeals for the Sixth Circuit affirming the Order of the District Court is not in conflict with decisions of other United States Circuit Courts of Appeal or of this Court.

(2) The decision of the United States Court of Appeals for the Sixth Circuit affirming the Order of the District Court is not a departure from the accepted and usual course of judicial proceedings, and no review by this Court is necessary.

VI.

COUNTER-STATEMENT OF FACTS.

On December 11, 1959, Respondents filed their Complaint against the Petitioner herein, Terry & Wright, Inc., for labor, material and equipment furnished Petitioner by Respondents for the construction of a dam and spillway at the Rough River reservoir in Grayson County, Kentucky under a contract with the United States. Respondents sought by their Complaint to recover upon the bond executed by the Petitioner, Federal Insurance Company, which guaranteed the prompt payment of all claims for labor and materials used in furtherance of the aforementioned contract.

Respondents' Complaint alleged as to jurisdiction the following:

> "1. Plaintiffs are citizens and residents of the State of Kentucky. The Defendant, TERRY & WRIGHT, INC., is a corporation created and existing under the laws of the State of Michigan and is a citizen and resident of said State. The Defendant, FEDERAL INSURANCE COMPANY, is a corporation created and existing under the laws of the State of New York and is a citizen and resident of said State.
>
> "2. The matter in controversy exceeds the sum of TEN THOUSAND DOLLARS ($10,000.00), exclusive of interest and costs."

Petitioners' Answer expressly admitted the allegations of jurisdiction contained in Respondents' Complaint even though conflicting boilerplate language was employed:

> "1. Terry & Wright, Inc., moves the Court to dismiss plaintiff's complaint because it does not state a cause of action on which relief may be granted and because this Court has no jurisdiction of this cause of action.
>
> "2. For answer to plaintiff's complaint, defendants admit the allegations of paragraphs 1, 2, 3, 4 and 5, and deny every other allegation therein."

Subsequent to the filing of Petitioners' Answer and Counter-claim, Respondents' Reply, Respondents' Amended Complaint and Petitioners' Amended Answer, this action was tried and on November 21, 1962,

a verdict in favor of the Respondents in the amount of Seventeen Thousand Eight Hundred and Eighty-Nine Dollars and Ninety-Two Cents ($17,889.92) was returned by the jury.

On November 23, 1962, the District Court entered a judgment reflecting the jury's verdict received two days earlier. On November 29, 1962, the Petitioners filed a Motion for Judgment under Rule 50(b) of the Federal Rules of Civil Procedure in accordance with their Motion for a Directed Verdict. On March 6, 1963, the District Court entered an Order overruling this Motion. On March 9, 1963, the Petitioners served upon Respondents notice of their intention to move the Court on Friday, March 15, 1963, to dismiss the action because of lack of jurisdiction. This was the first time in the thirty-nine (39) months since the action was filed that the Petitioners directed any attention to this issue.

On March 15, 1963, Petitioners filed a Motion to set aside the Judgment and enter a Judgment for the Petitioners for the reason that the Court lacked jurisdiction of the controversy. During the pendency of Petitioners' motions to vacate and to dismiss, Respondents moved to file a Third Amended Complaint. Respondents' amendment specifically invoked the District Court's jurisdiction under the Miller Act (40 U.S.C. 270). As was stated by the Circuit Court of Appeals in its Opinion, the Third Amended Complaint "... did not change in any respect the substantive allegations setting forth Plaintiffs' claim." On June 17, 1963, the District Court entered an Order overruling

the Motions filed by Petitioners on March 8, 1963 and March 15, 1963, respectively, and sustained the Respondents' Motion to file their Amended Complaint. From the Order dated June 14, 1963 and entered June 17, 1963 refusing to set aside the Judgment as void and permitting the filing of the Third Amended Complaint, the Petitioners filed a Notice of Appeal on June 27, 1963 with the United States Court of Appeals for the Sixth Circuit.

This appeal was briefed and argued before the Sixth Circuit. On May 11, 1964, the United States Court of Appeals for the Sixth Circuit entered its Opinion and Judgment affirming the June 27, 1963 Order of the District Court.

VII.

ARGUMENT.

Review by This Court Should Be Denied. The Decision of the Court of Appeals for the Sixth Circuit Affirming the Order of the District Court Is Not in Conflict With Decisions of Other United States Circuit Courts of Appeal or of This Court and Is Not a Departure From the Accepted and Usual Course of Judicial Proceedings.

There exists no justification whatsoever for the granting of certiorari either on the basis of the Petition or on the basis of any other relevant consideration.

Petitioners first dispute the original jurisdiction of the District Court on the dual theory that either there was incomplete diversity of citizenship or that the original Complaint did not state facts sufficient for a

cause of action under the Miller Act. The objection to the lack of diversity is not well taken because the Respondents' Complaint could have been dismissed on motion of Terry & Wright, Inc., as to Terry & Wright, Inc., the party against whom diversity may have been lacking. The Circuit Court recognized that "if Terry & Wright, Inc., were dismissed from the case there would be no question that even diversity jurisdiction existed."

Petitioners' attack of the Circuit Court's finding that the original Complaint stated a cause of action under the Miller Act and their struggle to find a conflict between the decision of the Circuit Court and the decisions of other jurisdictions is indicative of the extremely slim reed upon which this Petition is premised.

The Respondents' original Complaint was specifically based upon and incorporated the contract between the United States Corps of Engineers and the Petitioners and the statutory bond furnished pursuant to that contract, for all of which the Respondents were subcontractors. The Complaint specifically recited that the contract for the construction of the dam and spillway was with the United States and that the bond was executed to guarantee the performance of that contract and the payment of all bills for labor and materials furnished in connection therewith. Certainly, these allegations were sufficient to invoke jurisdiction under the Miller Act and the Circuit Court so found.

The purpose of the Miller Act is to protect individuals who supply labor and materials for use in government construction and the Act is to be liberally construed in order to effect this purpose. *St. Paul Fire & Marine Ins. Co. v. U. S. for the Use of Dakota Electric Supply Co.*, 309 F. 2d 22 (8th Cir., 1962), cert. den. 83 Sup. Ct. 883, 372 U. S. 936, 9 L. Ed. 2d 767 (1963). To ignore and thereby vitiate the substantive basis of Respondents' claim for labor and materials because of the failure to name the Act under which the action was brought is to put an unjustifiably high premium on form. This is even more true where, as was here the case, the facts tried were identical under any and all of the amendments filed.

The Petitioners assert that the Circuit Court's holding that the failure to join the United States is not prejudicial error since the United States is a nominal party in Miller Act proceedings, is in conflict with *United States Fidelity & Guaranty Co. v. U. S. for the Benefit of Kenyon*, 204 U. S. 349, 51 L. Ed. 516 (1907); *Barnard-Curtiss Co. v. U. S. for the Use and Benefit of D. W. Falls Construction Co.*, 252 F. 2d 94 (10th Cir., 1958); and *United States for the Use and Benefit of Browne and Bryan v. Massachusetts Bonding & Insurance Co.*, 29 FRD 162 (1962).

In *United States Fidelity & Guaranty Co., supra*, it was held that the presence of the United States as a party was sufficient to give the Circuit Court jurisdiction even though the amount in dispute was less than the jurisdictional amount required. In *Barnard-Curtiss Co., supra*, the United States was held to be a

real party in interest under the Miller Act within the meaning of Rule 73(a) of the Federal Rules of Civil Procedure which provides that in any action to which the United States is a party, the time for appeal shall be sixty (60) days from the entry of judgment. The *Barnard-Curtiss Co.* case was subsequently followed on almost identical facts in *United States for the Use and Benefit of Browne and Bryan, supra.*

None of these three cases are in conflict with the Opinion of the Court of Appeals for the Sixth Circuit since none of them treat the question of whether or not the United States need be joined as a party plaintiff in a Miller Act action. Each case determines the impact of joinder of the United States in such proceedings upon the right of appeal and upon the Court's original jurisdiction. The Sixth Circuit was not called upon to decide any of these questions but only whether the United States in fact was required to be joined as a party plaintiff in such proceeding or whether the United States was merely a nominal party whose joinder was not required to sustain a Miller Act action.

There is no serious dispute as to the nature of the interest of the United States in Miller Act proceedings. As was stated in *United States for the Use and Benefit of Browne and Bryan, supra*, a decision upon which the Petitioners rely:

> "In Miller Act proceedings it appears that it cannot be truthfully said that the United States is a 'real party in interest' as that term is generally applied to legal proceedings."

This Court has recognized the nominal status of the United States in such proceedings. In *Equitable Surety Co. v. United States for the Use of W. McMillan Co.*, 234 U. S. 448, 457, 58 L. Ed. 1394 (1914), this Court stated that the United States is a nominal obligee on the general contractor's bond and, with respect to the general contractor and subcontractor, is a mere trustee.

The Petitioners have not and cannot demonstrate any prejudice suffered by reason of the failure of Respondents to name the United States as a party in the original Complaint. The United States, if it had been joined, would not have participated in any manner in the suit. The United States would not have been liable for any costs or expenses of the litigation, 40 U.S.C. 270 b (b). The United States has no interest in Respondents' claim. The failure to join the United States is at most a formal irregularity which does not affect jurisdiction. This formal irregularity was subsequently cured by the Respondents' Third Amended Complaint.

The Petitioners' contention that the Circuit Court erred in finding that the Respondents' original Complaint sufficiently invoked the District Court's jurisdiction is without support and no conflict of authority has been displayed. Therefore, certiorari is not available on this ground.

Petitioners next contend that at the time that Respondents filed their Third Amended Complaint the judgment of November 23, 1962 had become final and, consequently, only under Rule 60 of the Federal Rules

of Civi Procedure could the Complaint be amended. This contention is premised upon the erroneous conclusion that the District Court had lost jurisdiction to permit the filing of the Amended Complaint. However, as the Court of Appeals recognized, if the District Court had jurisdiction to pass upon the Petitioners' motions to vacate and to dismiss, it certainly had jurisdiction to permit the filing of an amended complaint so as to remedy the technical defects of which the Petitioners were complaining.

Counsel for Petitioners rely upon three decisions in support of their position that a complaint may not be amended after a judgment becomes final. Petitioners cite *T.S.C. Motor Freight Lines v. Leonard Truck Lines*, 4 F.R.D. 306 (D.C., La., 1945), for this proposition. In that case the Appellee sought by its amendment to sue for damages in lieu of the action for specific performance initiated earlier. The Appellee's attempt to amend its Complaint to reflect a new cause of action met with disfavor inasmuch as an independent action therefor could have been maintained. This factor persuaded the Court to assume a more restricted posture. 28 U.S.C. § 1653 is not referred to in the case.

Petitioners next cite *Kelly v. Delaware River Joint Commission*, 187 F. 2d 93 (3rd Cir., 1951). This decision was expressly based upon that Appellee's inability to amend "as a matter of right." Furthermore, Appellee's attempt in the *Kelly* case to amend more than eleven months after entry of the judgment did

not increase the Court's receptiveness to Appellee's Motion.

Finally, Petitioners cite *Rivoli Trucking Corp. v. New York Shipping Association*, 167 F. Supp. 943 (D.C.N.Y. 1957), where Appellee attempted to amend more than one year after the judgment had been entered. The Court noted that:

> "There is nothing pending in this district so as to permit Plaintiff to restate or update its Complaint."

It is untenable for Petitioners to contend that *Rivoli* or either of the other two cases cited hereinabove are controlling of the Respondents' right to amend in view of 28 U.S.C. 1653. Additionally, in none of these cases as is here true did the Trial Court have jurisdiction inasmuch as there was nothing pending before it.

There exists no conflict of authority on this point.

Petitioners next contend that 28 U.S.C. 1653 does not permit the filing of Respondents' Third Amended Complaint after a final judgment.

Section 1653 of Title 28 of the United States Code provides:

> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

The legislative intent behind this particular statutory provision was "to permit amendment broadly to avoid the dismissal of suits on technical grounds." *Moore v. Coats Company*, 270 F. 2d 410 (3rd Cir.

1959). The Revisor's Note to the 1948 Judicial Code demonstrates this since it is provided:

> "Section 1653 was extended to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by Section 399 of Title 28, USC, 1940 Ed."

The courts generally recognize that Section 1653 should be applied with liberality. *Moore* v. *Coats Company, supra.*

The cases cited above have been followed uniformly and there can be no doubt relative to the interpretation of Section 1653. For other authority substantiating Respondents' position see: *National Farmers' Union Property & Casualty Co.* v. *Fisher*, 284 F. 2d 421 (8th Cir., 1960); *Garcia* v. *Bevaabe*, 388 F. 2d 60 (1st Cir., 1961); *Burkhart* v. *Bates*, 296 F. 2d 315 (8th Cir., 1961); *Stenhouse* v. *Jacobson, et al.*, 193 F. Supp. 694 (D.C. Cal., 1961); *Allstate Insurance Company* v. *Lumbermen's Mutual Casualty Company*, 204 F. Supp. 83 (D.C. Conn., 1962).

Relative to the question of the propriety of Respondents filing their Third Amended Complaint after judgment, reference should be had to those cases in which amendment was permitted after the statute of limitations had run against Appellee's cause of action: *Zellem* v. *Herring*, 97 F. Supp. 103 (D.C. Pa., 1953), where amendment was permitted after the case had reached the appellate level. *Brooks* v. *Yancey*, 200 F. 2d 663 (1st Cir., 1953). *Fry* v. *Lagna-Western Com-*

pany, 282 F. 2d 97 (8th Cir., 1960); and, further, to a decision in which amendment to show jurisdiction was permitted after the case had reached the Supreme Court, *Molnar* v. *National Broadcasting Company, Inc.*, 231 F. 2d 684 (9th Cir., 1956).

Petitioners argue that 28 USC 1653 was not available to permit the filing of the Third Amended Complaint because the case was not at that time in either the Trial Court or the Appellate Courts. This contention ignores the fact that at the time it was filed, the Trial Court had before it Petitioners' motions to vacate and to dismiss. Surely, Petitioners do not contend the case was "not in the Trial Court" at the time their motions were pending. Petitioners' tenuously drawn distinctions between "omitted allegations" and "defective allegations" of jurisdiction finds no support in the liberal interpretation which has been unanimously accorded 28 U.S.C. 1653. *Moore* v. *Coats Co., supra.* Furthermore, Petitioners offer no conflict between the Circuit Court of Appeals' Opinion and that of other jurisdictions and Respondents respectfully submit that there is none.

Petitioners' final contention questions the sufficiency of the Respondents' Third Amended Complaint. It is claimed new matters were placed in issue by the pleading which were not tried. The new matters which were pled under the Third Amended Complaint were not of a substantive nature and did not add to or detract from Respondents' right to relief from both of the Petitioners. Instead, the amendment merely brought into clearer focus the cause of action originally

pled. The Trial Court certainly did not depart from the accepted course of judicial proceedings in permitting the amendment to be filed and no prejudice was suffered by the Petitioners.

Once again Petitioners cite no authority which conflicts with the Circuit Court's decision.

VIII.

CONCLUSION.

The Petitioners have failed to demonstrate any basis whatsoever for the granting of certiorari by this Court and it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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Louisville, Kentucky 40202,
Attorneys for Respondents.

IX.

CERTIFICATE OF SERVICE.

I, EDGAR A. ZINGMAN, one of the counsel for the Respondents herein, certify pursuant to Rules 24 and 33(b) of the Rules of this Court that on _____, 1964 five copies of the foregoing Brief were mailed, postage prepaid, to Robert P. Hobson, Attorney for Petitioners, Kentucky Home Life Building, Louisville, Kentucky.

_____

EDGAR A. ZINGMAN